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SUPREME COURT NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

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ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION

RONALD T. HUBBARD (P.24241)
Attorney for Petitioner
Member of the Bar of the
Supreme Court of the
United States
24700 Northwestern Highway
Suite 418
Southfield, Michigan 48075
Phone: (313) 354-3200

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Petitioner ERNEST L. CITRON prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit entered on April 28, 1981, affirming Petitioner's conviction for income tax evasion.

1. QUESTIONS PRESENTED FOR REVIEW

a) Whether the District Court erred in denying Petitioner's Motion for Suppression of Evidence given the unauthorized appropriation and use of statutory authority by the examining Revenue Agent for the purpose of conducting a non-tax search of private papers in violation of Constitutional rights guaranteed by the Fourth and Fifth Amendments.

b) Whether the District Court erred in denying Petitioner's Motion for Suppression of Evidence given the use of deception by the examining Revenue Agent, which thereby vitiated Petitioner's consent to the search and violated the claimed statutory authority for the search as well as Petitioner's Constitutional rights guaranteed by the Fourth and Fifth Amendments.

c) Whether the District Court abused its discretion in denying

Petitioner's Motion for Rehearing since that ruling prevented Petitioner from examining a crucial witness whose apparent importance to the resolution of the case was not revealed until the prosecution's key witness gave trial testimony which contradicted prior testimony he had given.

d) Whether the District Court erred when it found that Petitioner had consented to the removal of crucial evidence from his business premises by the examining Revenue Agent, since the only evidence relied on in that finding was the testimony of the Agent, which was inconsistent, unreliable, and contradicted by other creditable evidence.

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4. OPINIONS BELOW

Petitioner ERNEST L. CITRON was indicted in a three count indictment returned on August 17, 1977, by the Federal Grand Jury for the Eastern District of Michigan, Southern Division. He was charged with having willfully and knowingly attempted to evade the payment of federal income tax for the years 1970, 1971, and 1972 in violation of Section 7201, Title 26, United States Code. Petitioner was tried and convicted in the United States District Court for the Eastern District of Michigan, Southern Division, before the Honorable John Feikens, Chief Judge, sitting without a jury. Petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit; that Court issued an opinion affirming Petitioner's conviction on April 28, 1981.

5. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). Petitioner's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit on April 28, 1981, and this Petition is timely filed within 60 days thereafter pursuant to Supreme Court Rule 20.1.

6. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated..."

Fifth Amendment to the Constitution of the United States: "[N] or shall any person...be deprived of life, liberty, or property, without due process of law..."

26 United States Code 7602: "For the purpose of ascertaining the correctness of any return...the Secretary is authorized (1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry..."

7. STATEMENT OF THE CASE AND FACTS:

Petitioner was convicted in a Federal bench trial of a violation of 26 U.S.C. 7201 on the basis of documentary evidence that was admitted over petitioner's objection. This petition draws into question the use of the audit examination power granted to the Secretary of the Treasury by a governmental agent who acted in a deceptive manner.

Because the sequence of event in this matter is crucial to an understanding of the issues presented by this petition, the facts are set out in detail below.

The investigation that led to indictment of Petitioner, Ernest L. Citron (hereinafter "Citron") began in 1973. At that time Revenue Agent William Engelson, a civil tax examiner for the Internal Revenue Service, was participating in the Narcotics Traffickers Program. Specifically, he had been assigned to assist Special Agent Thomas Kraft, a criminal investigator, in the tax fraud investigation of Tako Peshkopia, a suspected low-level narcotics dealer. Citron came to the attention of the agents during that investigation. The agents learned that Citron, an attorney, had previously represented Peshkopia. They further determined that Citron had purchased a beauty shop from Peshkopia and that Peshkopia had been observed driving Citron's automobile. The agents discussed Citron as a possible third party

contact in aid of the Peshkopia investigation, but Kraft decided a contact would not be worth the "...government's time and money" 1/ Apparently without Kraft's knowledge or consent, Engelson began an investigation of Citron's financial affairs. He obtained Citron's bank records and determined that approximately $200,000 had been deposited and withdrawn from the beauty shop account over a six month period. Engelson testified that, although he did not at that time suspect tax fraud, he had formed the suspicion Citron was engaged in illegal narcotic activity.

Acting on this suspicion, he initiated a contact with Citron. During the evidentiary hearing, Engelson testified that he was acting "strictly on my own." In his affidavit filed with the

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1/ Citations to the record have been omitted at this stage in the interest of maintaining the preliminary appendix at a reasonable size.

Trial Court, he stated that he had been "assigned" the audit examination of Citron's tax returns. He later conceded, "I may have misused the word." During the trial, he testified that he had discussed the Citron matter with his supervisor.

On cross examination Engelson testified that he did not recall discussing Citron with Special Agent Kraft, the head of the Peshkopia investigation. He also testified that he was not in contact with the Drug Enforcement Administration, the Department of Justice, or with the United States Attorney's Office. Engelson's first contact with Citron was a telephone call placed on September 5, 1973. Agents Engelson and Kraft met for several hours on the morning of that day concerning the Peshkopia investigation; however, Kraft testified that he did not recall any

discussions with Engelson regarding Citron. On direct examination by the Court he testified that "I may have mentioned something to [Kraft]." Kraft maintained throughout his testimony that he was totally unaware of Engelson's activities with respect to Citron.

Purpose of Inquiry

The testimony of Engelson concerning the purpose of the inquiry may fairly be divided into three versions: (1) Pre-Discovery Version; (2) Post-Discovery Version, and (3) Re-Opening Version.

Pre-Discovery Version - "Routine Audit"

During the subsequent tax fraud investigation, Citron learned that Engelson had made complete sets of copies of his books and records. On April 25, 1977, he filed a Pre-Indictment Motion for Return of

Property. Citron claimed that substantially all of his books and records had been taken from his business office without permission, and sought the return of the photographically-reproduced copies of those records. Engelson testified that he had received permission to remove the records. He further testified that he had offered to give receipts for the records, but had not issued the for.[illegible]. The evidentiary hearing was held over a period of two days; Judge Churchill heard the testimony of both Engelson and Citron. On August 3, 1977, he declined to exercise jurisdiction, holding that, since both Engelson and Citron gave credible testimony, the question of consent to remove records was "very, very close", and therefore the court ought not exercise jurisdiction or grant relief unless there had been a clear violation of the claimant's constitutional rights.

The information concerning the relationship of the Citron case to the Peshkopia investigation was not made available by the government before or during that proceeding. On cross examination Engelson was asked, in view of the extensive copying, if he had conducted an "In Depth Audit" of Citron's books and records. Engelson testified. "As far as I was concerned it was just a routine audit". On direct examination by the Court, he testified that he was "not necessarily" suspicious of Citron at the time of the audit.

Post-Discovery Version - "Third Party Audit"

Discovery made available to Citron the transmittal report authored by Engelson, which described the background of the case. In that report Engelson stated the following:

> "Thinking that these [bank] funds were 'tainted' or might have stemmed from narcotic activities, Mr. Citron's tax returns for the years 1970 thru [Sic] 1972 were requisitioned as a related case to [Peshkopia]."

At that point Engelson revealed that he had developed a "suspicion" that Citron could have been the finance man for Peshkopia; that Citron was "...where [Peshkopia] was getting his money from." On direct examination by the Court he testified that at the time of the initial contact he was "not interested" in Citron's returns. Engelson testified that until his suspicions were "...proven otherwise... I had to give the taxpayer every opportunity to show why a quarter of a million or $220,000 was going in and out, the source of the money". However, Engelson did not disclose his suspicions to Citron.

Citron argued that at the time of the initial contact he was the target of a criminal inquiry, unrelated to the tax

audit. Engelson's position was that his "primary purpose" was to obtain information in connection with the Peshkopia investigation and that he had not told Kraft. The Court pursued Engelson's explanation and encouraged him to "think hard" on the question of whether he had communicated with Kraft. Engelson responded that he "may have mentioned something".

When Engelson was asked why he did not advise Citron of the facts underlying the contact, he testified that he could not reveal that information because of the narcotics investigation of Peshkopia. When it was established that there was no such investigation at the time of the initial contact, he recanted and said that he did not want to reveal the existence of the tax fraud investigation of Peshkopia. When it was established that normal IRS procedures permitted the agent to reveal the existence

of such an investigation, he subsequently stated he had not done so because "...it would tip my hand and it would make the taxpayer apprehensive and I might not get the books and records that I was seeking."

The evidentiary hearing was closed on April 11, 1978. At that time Engelson's testimony was that the contact with Citron was in the nature of a third party contact which had as its primary purpose the development of information to assist the Peshkopia investigation.

On May 3, 1978, Citron filed a Supplemental Brief containing the relevant portions of the Internal Revenue Manual which describe the respective responsibilities of a Special Agent and Revenue Agent in conjunction with a joint tax fraud investigation, and argued that Engelson's explanation was totally implausible.

Re-Opening Version - "Dual Purpose"

On July 11, 1978, at the government's request and over Citron's objection the evidentiary hearing was reopened. At that hearing Engelson testified that at the time of the initial contact he had two purposes (1) to find out information about Peshkopia, and; (2) to perform a civil audit of Citron's tax returns.

Court's Opinion

On November 29, 1978, in its Opinion (App. 18) the Court denied Citron's Motion for the Suppression of Evidence based upon a finding that Engelson had a legitimate purpose at the time he contacted Citron, i.e. to determine the correctness of the tax returns, and the fact that he may also have suspected that "there might be some narcotic activity did not make the examination illegal." This opinion also

included a finding that Engelson did not engage in trickery or deception and that the audit had been conducted within the scope of the consent given by Citron. The court denied Citron's renewed Motion using similar language on June 19, 1980, (App. 32).

Trial

Citron was convicted of a violation of 26 U.S.C. 7201 on June 19, 1980.

Appeal

Citron's conviction was affirmed by the Sixth Circuit Court of Appeals on April 28, 1981. (App. 57).

8. LAW AND ARGUMENTS

a) WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUPPRESSION OF EVIDENCE GIVEN THE UNAUTHORIZED APPROPRIATION AND USE OF STATUTORY AUTHORITY BY THE EXAMINING REVENUE AGENT FOR THE PURPOSE OF CONDUCTING A NON-TAX SEARCH OF PRIVATE PAPERS IN VIOLATION OF CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTH AND FIFTH AMENDMENTS.

LAW

The basic protection afforded by the Fourth Amendment was stated succinctly in Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967): "The basic purpose of this Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (emphasis added)

The essence of Argument One is this: Who shall have the power to

decide when a citizen's right to privacy must yield to the right of governmental inspection? The Supreme Court has made it perfectly clear that the individual government field agent does not possess the discretionary authority to invade privacy. The Camara Court spoke directly on this point; 387 U.S. 523, 532: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

Thus the warrant requirement with its procedural regularity has been interposed between the government and the citizen. But even in the situation where warrantless searches are authorized, the procedural and supervisory components of such authorization must be

respected; otherwise, "...the authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." Secretary of Labor v. Barlow's, 436 U.S. 307, 320 (1978).

Enforcement of the tax law as an activity of government is not exempt from the strictures of the Fourth Amendment. G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). Since IRS employees enjoy no special dispensation from the Fourth Amendment, they must rely on statutory authority when conducting warrantless searches, i.e., audit examinations. Congress has recognized the inappropriateness of the warrant requirement in the routine tax audit situation by enacting 26 U.S.C. (hereinafter "I.R.C.") § 7602. This provision authorizes the Secretary of the Treasury to

examine books and records and to issue summonses to compel their production without the necessity of obtaining a warrant.[2/] It is essential to note how

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2/ I.R.C. § 7602 reads as follows:

SEC. 7602 EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

narrowly drawn this authority is; only specified tax-related matters are proper objects for its exercise.

The limited scope of § 7602 is also emphasized by the nature of its operative provisions. The target taxpayer's consent is a prerequisite to the exercise of the examination authority; the IRS must issue a summons to the non-cooperative taxpayer. Such a summons is not self-enforcing, in that the IRS must seek judicial enforcement if the taxpayer chooses to disobey it. The clear purpose of these limitations and safeguards is to foreclose arbitrary, abusive exercises of the statutory authority.

FACTS AND ANALYSIS

The search carried out by Revenue Agent Engelson of Citron's personal books and records was an objectionable misuse of statutory authority because it was arbitrary, unsupervised, and for an improper purpose.

1) Arbitrariness: Engelson, while his testimony was subject to change during the course of the various evidentiary hearings held by the trial court, maintained during the bulk of his testimony that he had initiated the inquiry with Citron by requisitioning his tax returns. For example, he testified that the contact with Citron was "strictly on my own." In its opinion denying Citron's Motion to Suppress Evidence, the trial court, quoting Engelson in part, found: "'[T]hinking that these records were tainted or might have stemmed from some narcotic activity', Engelson requisitioned Citron's returns for 1970, 1971, and 1972" (App. 19). It is clear that Engelson was acting on his own personal suspicions. This is

firmly established by his testimony:

> The Court: If you had not had that suspicion [narcotics activities] you wouldn't have conducted the audit, would you?
>
> The Witness: I wouldn't have requisitioned the return.
>
> The Court: That's what led you to Mr. Citron?
>
> The Witness: That's correct, your honor.

At trial, Engelson testified that the decision to investigate Citron was his own.

(2) Supervision: As pointed out in the preceeding paragraph, Engelson initiated the audit on his own personal suspicion. He testified that he had no contact with his supervising Special Agent prior to the audit. Notable by its absence from the evidentiary hearings is any reference to contact by Engelson with supervisory personnel

of the IRS in connection with the decision to examine Citron's personal books and records.

At trial, Engelson changed his testimony. He seems to have said that he discussed the matter with one Ted Eckhardt, his supervisor. Whether this alleged discussion amounted to more than the initialing of requisition forms is unclear because the trial court would not allow Citron a rehearing to explore this crucial contradiction. Because of this denial, the exact nature of his supervisory capacity in the audit of Citron is unclear. It is submitted that, as far as the record shows, Engelson conducted the audit without any meaningful supervision by IRS executive personnel.

(3) Improper Purpose: Engleson testified on numerous

occasions that he was uninterested in tax-related matters at the inception of the audit.

a) T-Letter: "[T]hinking that these records were tainted or might have stemmed from some narcotics activity..."

b) Motion to Suppress,

The Court: That's what led you to Mr. Citron?

Engelson: That's correct your honor.

The Court: The fact that you believed that some of his money was tainted with narcotics activities, right?

Engelson: Initially, yes.

c) Rehearing,

Q. (Prosecuting Attorney): Mr. Engelson, do you understand that we are concerned with understanding where your focus was when you did this investigation. Do you understand that, sir?

A. (Engelson): Yes, sir.

Q. Were you concerned about uncovering information, if possible, about Tako Peshkopia?

A. Since I was in the midst of his examination - yes I would be.

Q. Would it also be true that you were interested in Ernest Citron because of your suspicions and concerns about his possible involvement or possible criminal activity?

A. Yes, sir.

It is manifest from the Agent's testimony that the decision to contact Citron was predicated upon a personal suspicion of possible involvement in criminal activity. This activity must be distinquished from an arguably permissible criminal purpose - tax fraud. Engelson specifically denied that at the time of the initial contact he had had a belief that Citron had committed tax fraud, as follows:

Q. (Mr. Siegel): Mr. Engelson, is it correct to say that during the course of a tax

audit of a third party, that you discovered something in the order of $220,000 or more going into Mr. Citron's checking account that caused you to initially requisition the returns?

A. (Engelson): That's correct.

Q. And at that point did you think that Mr. Citron had committed tax fraud?

A. No, sir.

SUMMARY

The audit search of Citron's private books and records was an unauthorized appropriation and use of the statutory authority granted under I.R.C. § 7602. Engelson testified that his personal suspicions prompted the contact with Citron. During the evidentiary hearings, no evidence was introduced by the government which in any way established procedural or supervisory justification for Engelson's conduct. It is clear no such evidence exists. The motivating factor behind the initiation of the audit examination was Engelson's belief

that Citron was engaged in illegal narcotic activity; a belief that he was the "finance man" behind Peshkopia. Engelson utilized the audit authority as a pretext or guise to gain entry to the premises and access to the records, so as not to "tip his hand" about his purpose to conduct a search for evidence of tax-unrelated criminal activity. No evidence of institutional review or supervisory control is on the record. The decision to contact Citron lacked the procedural safeguards mandated by the Fourth Amendment and otherwise imposed by Congress in the enactment of I.R.C. § 7602. Hence, Engelson had no legal authority to initiate and conduct the search of Citron's private papers and, therefore, the search was illegal.

The trial court neither confronted nor decided this important issue, although it was submitted and argued at length. By avoiding this issue, the

trial court implicitly sanctioned this conduct and permitted its fruits to be admitted as evidence against Citron. This failure was clearly erroneous. That error was material and prejudicial as the evidence from that examination constituted the primary proof in the prosecution's case.

b) WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUPPRESSION OF EVIDENCE GIVEN THE USE OF DECEPTION BY THE EXAMINING REVENUE AGENT, WHICH THEREBY VITIATED PETITIONER'S CONSENT TO THE SEARCH AND VIOLATED THE CLAIMED STATUTORY AUTHORITY FOR THE SEARCH AS WELL AS PETITIONER'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTH AND FIFTH AMENDMENTS.

LAW

It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue Agent. United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Ponder, 444 F.2d 816 (5th Cir. 1971), cert. denied 405 U.S. 918, (1972); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970) cert. denied, 400 U.S. 831, (1970). As all parties agree: "It is equally clear that he (Engelson) may not induce consent to examine records by

trickery or misrepresentation." (App. 9). The Sixth Circuit said in United States v. Marra, 481 F.2d 1196, 1199 (6th Cir. 1973):

> "Without extended discussion, we set out the controlling law as to what must be shown to warrant a finding that a taxpayer has been tricked or deceived by government agents into providing incriminating evidence to such agents. In United States v. Prudden, (supra), the rule is given ...."

The Prudden court stated the following regarding silent misrepresentations:

> "Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading."

A Revenue Agent need not explain all the potential ramifications of a routine audit to the taxpayer in the absence of circumstances which render silence misleading, (e.g. Prudden, Marra), but the use of misleading or deceptive statements is not permitted. United States v. Tweel, 550 F.2d 297

(5th Cir. 1977). In Tweel a Revenue Agent's truthful statement that no Special Agent (criminal investigator) was involved in the case was held to be so deceptive as to vitiate the taxpayer's subsequent consent to the audit. This was because the representation that the inquiry was "routine" and nothing more was deemed deceptive when in fact it had been requested by a criminal branch of government, namely the Organized Crime Strikeforce. Citing Prudden and remanding, the court said:

> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky, deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material. Any findings to the contrary under the facts of this case are clearly erroneous. (citations omitted). Tweel at 300.

On the other hand, decisional law has recognized that our tax laws are a law enforcement system in which the

criminal and civil elements are inherently intertwined. Assuming that an audit is assigned to a revenue agent through the normal procedural channels, the initial dual purpose does not impress upon the examining agent the obligation to give a Miranda-type warning or its equivalent. The civil examiner need not inform the taxpayer that if evidence of tax fraud is uncovered a criminal prosecution may ensue.

The fundamental difference between these non-abusive situations on one hand and Tweel and the present controversy on the other is conscious deception. While a Revenue Agent need not inform the taxpayer of every possibility, he is absolutely precluded from practicing deception in order to gain consent to the examination. In the instant case the trial court recognized this important distinction at a superficial level, but failed to come satisfactorily to

grips with the vital issue of deception. This is most graphically demonstrated by its reliance in denying Citron's motion on the summons cases under IRC § 7602, in particular United States v. LaSalle National Bank, 437 U.S. 298 (1979). LaSalle and the summons cases cited by the court are cases of statutory interpretation as it relates to the IRS Summons authority. They do not place in issue the question of deception and the illegal appropriation of the statutory authority to gain access to private papers for criminal purposes unrelated to the administration of the tax laws.

FACTS AND ANALYSIS

The Court's opinion denying Citron's motion was predicated upon a finding that Engelson possessed a dual purpose at the time of the initial contact with Citron: First, to determine the correctness of Citron's tax returns, and;

second, to further the Peshkopia investigation. This finding is unsupported by the facts of this case.

INITIAL INQUIRY WITH CITRON WAS UNRELATED TO THE PESHKOPIA TAX INVESTIGATION AND HAD AS ITS PRIMARY PURPOSE A SEARCH FOR EVIDENCE LINKING CITRON WITH NARCOTIC TRAFFICKING

The truth is that Engelson's contact with Citron was unrelated to the Peshkopia tax fraud investigation. Peshkopia's conviction and incarceration in April 1973 substantially eliminated the prosecution potential of the tax fraud case. Engelson's Superior, Kraft, emphasised that factor in his final report recommending that the case be terminated. If there existed an extraordinary reason to contact Citron in order to advance the criminal case, why was Kraft not aware of it? He had

considered contacting Citron and concluded that it was not worth the "government's time and money." Further, Kraft was in charge of the Peshkopia case. Engelson said he wanted to determine where Peshkopia "was getting his money from." That is not a tax inquiry; it is an inquiry more suggestive of a narcotics investigation directed against Citron. Consider; is it likely that the government would utilize the testimony of an attorney-narcotics financier to convict a street peddler; or is the reverse more probable? Engelson's testimony on this issue is not worthy of belief. The truth is that Engelson utilized the Peshkopia tax case as a ruse to obscure the fact Citron was the real target of the criminal inquiry. Engelson conducted a fishing expedition. He was "not interested" in Citron's tax returns; he was interested in connecting Citron with narcotic trafficking.

Engelson searched Citron's records to uncover a broader pattern of illegal activity.

CITRON INQUIRY DISTINGUISHED FROM AUDIT OF PERSON INVOLVED IN ILLEGAL ACTIVITY

It is arguably permissible for the IRS to audit individuals engaging in illegal activities. Illegal activities generally give rise to unreported income. That, however, is not the Citron case. Citron was audited by Engelson to determine if he was involved in illegal activities, and that is quite a different question. Engelson didn't know; he acted on mere suspicions. The latter procedure amounts to an arbitrary invasion of privacy and LaSalle bad faith. The tax laws were not intended to be utilized to promote general criminal

investigative inquiry. The investigative authority of the IRS was intended to implement inquiries regarding the accuracy of federal tax returns, not underlying criminality. LaSalle cautioned against the IRS becoming the evidence-gathering agency for other branches of government. The testimony of Engelson clearly indicates that his initial efforts were directed toward finding evidence which placed Citron in illegal activity. He maintained this explanation throughout his testimony. The situation is exacerbated upon a finding that the inquiry was prompted by the mere suspicious of a single agent acting alone and unsupervised. The audit undertaken by Engelson was arbitrary, capricious and a misuse of the statutory authority amounting to bad faith.

## ENGELSON ENGAGED IN CONSCIOUS DECEPTION

When the Court asked Engelson why he did not disclose to Citron the "primary purpose" of the inquiry, Engelson sought further refuge behind the Peshkopia ruse. He testified in unequivocal language that he did not disclose the purpose of his inquiry and the nature of his suspicion because of the risk of divulging information concerning the "drug" investigation.

> Q. (Kennan) "Mr. Engelson, the investigation of the third party, "X", (Peshkopia), was that a tax investigation or a drug investigation?
>
> A. It was a drug investigation.

The truth is that there was no such drug investigation.

Engelson had been with the IRS for over thirty years; he knew what he was doing. The real "danger" from Engelson's perspective was that if Citron knew that the real purpose of the investigation was to uncover possible involvement in

narcotics, he never would have consented to the "civil audit." The clear purpose of Engelson's actions was to deceive Citron into allowing an investigation of his books and records so that Engelson could satisfy his suspicions.

CITRON WAS DECEIVED

There is no questions but that Citron was deceived by the misrepresentations of Engelson. The trial court correctly found "...that, when Engelson called upon Citron, Citron was immediately aware of the personal risks accompanying a tax audit." (App. 24). Since he was an attorney and had recently undergone an audit of earlier tax years this is no doubt true and is undisputed. Citron's cooperation with the audit was cited by the trial court as proof that Citron was not effectively deceived. The Court stated: "He (Citron) admits that he permitted Engelson to

take certain peg registers from the office and allowed him the free reign of the office. That being so, I now find it incredible that Citron was in any way misled (assuming it was said) by Engelson's statement that this was a routine audit..." (App. 25)

The appellant submits that the opposite of the trial court's finding is a much more logical analysis of the evidence. It would be incredible that Citron, an attorney, would give the run of his office and records to an agent of the government who was trying to connect him up with an illegal narcotics operation. The fact that Citron was not involved in that operation is irrelevant; one need not be a criminal to be protected by the Fourth Amendment. There is no evidence whatsoever on the record tending to indicate that Citron would have consented to the inquiry had he known of its real purpose.

## SUMMARY

The District Court's finding that Citron was not deceived is clearly erroneous. The Revenue Agent's actions, both at the time of the investigation and during the subsequent hearings on the subject, indicate that he planned and carried out a pattern of conduct designed to deceive Citron. Only when the true circumstances of the investigation threatened to become known did he assert a genuine interest in Citron's tax returns. This manufactured assertion is insufficient to render his conduct acceptable. He began the investigation intending to deceive Citron and successfully did so. That deception was a material factor in building the government's against Citron, and constituted a grave violation of Citron's Fourth Amendment rights.

c) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR REHEARING SINCE THAT RULING PREVENTED PETITIONER FROM EXAMINING A CRUCIAL WITNESS WHOSE APPARENT IMPORTANCE TO THE RESOLUTION OF THE CASE WAS NOT REVEALED UNTIL THE PROSECUTION'S KEY WITNESS GAVE TRIAL TESTIMONY WHICH CONTRADICTED PRIOR TESTIMONY HE HAD GIVEN.

LAW

A trial court judge has, by the very nature of his function, far-reaching control of the proceeding over which he presides. It is not the function of the appeals process to reconsider each of the largely mundane rulings made by a trial judge in the course of a trial. This discretionary authority, however, is by no means absolute. The dynamic guarantees of a fair trial to the accused are of unquestionable precedence. Foremost among these guarantees is the Fifth Amendment requirement of

due process of law, encompassing the concept that "fundamental fairness" must be granted the accused. See e.g., United States v. Herndon, 536 F.2d 1027 (5th Cir. 1976).

This important concept is also recognized in the Federal Rules of Evidence (hereinafter FRE) and Criminal Procedure (FRCrP). FRE 401-403 define the concept of relevance in federal proceedings, and direct that relevant evidence shall be admitted unless a specialized circumstance, such as prejudice or waste of time, militates against its admission. Likewise, the procedure to be followed in a FRCrP 41(e) Motion for Return of Property requires the presiding judge to "...receive evidence of any issue of fact necessary to the decision of the motion." FRCrP 41(e). Citron's initial Pre-Indictment Motion was analagous to

FRCrP 41(e), and was so treated. Regardless of the nomenclature chosen to describe the motion, the direction to the presiding judge to consider all relevant evidence is entirely appropriate to the instant case.

FACTS AND ANALYSIS

The evidence which Citron sought leave to explore related to the important issue of the circumstances surrounding the initation of the examination of his books by Revenue Agent Engelson. Since the topic has been extensively discussed in Argument I, recapitulation of the general background will be limited to the most relevant points.

During the hearing on Citron's pre-indictment Motion for Return of Property, Engelson testified that the audit of Citron was a routine, ordinary audit. Since Citron had no inkling of

the underlying purpose of Engelson, i.e. to connect him in narcotic activity with Tako Peshkopia, Citron had no reason to delve into the authorization of the examination at that time.

After the Peshkopia investigation was brought to light by pre-trial discovery, however, Engelson consistently testified that he had acted alone in becoming suspicious and that not even his immediate superior on the Peshkopia investigation, Special Agent Thomas Kraft, had known of his inquiry into Citron's books. Engelson testified:

- Citron's returns were requisitioned rather than assigned in the normal manner.
- He could not recall mentioning the Citron matter to Special Agent Kraft. This lack of contact was corroborated by Kraft.
- The contact with Citron was "strictly on my own".
- He "decided" to do a "civil audit".

- He was "interested" in Citron because of "your (Engelson's) suspicions and concerns about his possible involvement or possible criminal activity."

- He wanted to find out where Peshkopia got his money.

- The decision to investigate was his <u>own</u> decision.

A few minutes after this last testimony, the following exchange ensued:

Q. (by Mr. Krieger) Is it your testimony that Mr. Eckhardt assigned you to conduct an audit of Mr. Citron's tax return?

A. (Engelson) Yes.

....

A. Could I correct my statement?

Q. Sure

A. I wrote a requisition for the years 1970, 1971 and 1972 which Mr. Eckhardt then approved.

....

A. I took the requisitions because of an assignment.

Citron has raised the issue of deception as it relates to the purpose

of the inquiry and the manner in which that purpose was represented to him. The revelation that an assignment had allegedly been made to Engelson (presumably by his fraud group supervisor, Ted Eckhardt) was a dramatic departure from Engelson's pre-trial testimony and raised profound questions about the fairness of the hearing received by Citron on the pre-trial motions. If Engelson was acting at the direction of higher echelons of the IRS (or perhaps the Justice Department), then the nature of this direction is extremely relevant to both the authorization issue and the deception issue. Any meaningful resolution of these issues must, in fundamental fairness, include an opportunity to examine Mr. Eckhardt. In this regard, Mr. Eckhardt should be made available by way of rehearing to answer the following questions:

1. Did he have pre-examination contact with Engelson concerning Citron?
2. Did he authorize the examination?
3. What was its purpose?
4. Did he possess prior knowledge of Citron?
5. Was he directed to examine Citron by a strike force or other arm of the Justice Department?
6. Did he discuss Citron with the Justice Department or any other agency of government?

SUMMARY

The denial of an opportunity to ask these questions was seriously prejudicial to Citron. For example, if Eckhardt testified that the audit was performed at the request of the Drug Enforcement Adminstration (Justice Department),

Engelson's representation that the audit was routine and similar to the truly "routine" audit Citron had just undergone would have been seriously deceptive. U.S. v. Tweel, 550 F.2d 297 (5th Cir., 1977). (See Argument b). It is not the fault of Citron that these questions were not raised earlier since Engelson did not reveal their foundation (allegation of assignment) until the time of trial.

The trial court's denial of a Rehearing was materially prejudicial and constituted an abuse of discretion. Petitioner's Fifth Amendment right to due process was materially infringed thereby.

d) WHETHER THE DISTRICT COURT ERRED WHEN IT FOUND THAT PETITIONER HAD CONSENTED TO THE REMOVAL OF CRUCIAL EVIDENCE FROM HIS BUSINESS PREMISES BY THE EXAMINING REVENUE AGENT, SINCE THE ONLY EVIDENCE RELIED ON IN THAT FINDING WAS THE TESTIMONY OF THE AGENT, WHICH WAS INCONSISTENT, UNRELIABLE, AND CONTRADICTED BY OTHER CREDITABLE EVIDENCE.

LAW

In determining whether a trial court has erred in admitting evidence over a claim that it had been illegally seized, the factual findings of the trial court will be accepted on appeal unless they are "clearly erroneous." This standard stops far short, however, of requiring the validation of such findings on appeal without careful examination. See e.g. United States v Mathis, 298 F.2d 790 (6th Cir. 1962), 2 Wright, Federal Practice and Procedure, Criminal § 678 (1969). The instant case presents a clear example of the kind of

clearly erroneous finding that must collapse under the most cursory examination of its underpinnings.

FACTS AND ANALYSIS

The prosecution's attempt to meet the burden of proof on its claim that Citron had consented to the removal of his cash receipts journal rested solely on the shoulders of Revenue Agent Engelson. The issue in essence was a conflict between Engelson, who claimed that consent had been given to the removal of any and all records, and Citron, who testified that while consent had been given to the removal of certain records, for a limited purpose and time, it had been neither given nor requested in the case of the cash receipts journal.

In choosing to believe Engelson's unsubstantiated version of events, the trial court chose to ignore two highly probative circumstances: 1) Engelson's

failure to give document receipts for the removed records in violation of IRS Procedures, and; 2) Engelson's credibility.

1. Failure to give document receipts. While Engelson's failure to give receipts is not solely determinative of the issue, it strongly suggests that consent was not given. The Internal Revenue Manual, which sets standards for the conduct of IRS Agents, reads as follows at MT 1218-49, approved 3/1/66:

> Removal of books, records and documents to a Service Office.
>
> Books, records and other documents may be removed to a Service Office for examination when the person furnishing them agrees to such action. A receipt shall be issued for books, records and other documents so removed and they should be retained only for such time as may be reasonably necessary, under all circumstances, to effect the purpose for which they were obtained. (emphasis added)

First, as a matter of fact, the issuance of document receipts is a required and standard procedure. Second, it is unreasonable to accept the agents explanation that he considered their issuance discretionary. He testified that he gave receipts: "Only if they request it, or they say it isn't necessary, we do not give receipts." Third, the receipt itself, Form 2725, is intended primarily for the protection of the removing agent; i.e. to forestall just the kind of dispute that is here present. Engelson had been with the IRS for over thirty years. Given his experience, it is inconceivable that he would have risked the entire investigation by failing to give a receipt if consent had actually been given. Finally, the

court in its opinion finds it unlikely that Citron did not give consent, relying on his cooperation with other phases of the audit. Citron submits, given these facts, that logic requires a finding that the lack of receipts strongly indicates that no consent was given.

2. Credibility. It would serve no meaningful purpose to list the total number of inconsistencies in Engelson's testimony. A substantial number of them have been pointed out in this brief, while others are contained in the pleadings, and still others are readily apparent from a casual reading of the transcript. This is in marked contrast to the testimony of Citron which, save for the testimony of Engelson, was uncontradicted.

SUMMARY

The trial court's findings regarding the question of consent to remove the records was clearly erroneous. On the question of consent, Engelson's testimony was totally uncorroborated. The government could not produce the required receipts because they were not issued. Receipts are given for the protection of the agent; why would he not have issued them if he had received consent to remove the records? The trial court felt persuaded by circumstances to infer consent. It is submitted that the cited circumstances are relatively neutral and are equally consistent with a lack of consent. The trial court chose to allow these neutral circumstances to outweigh two highly probative facts. It is a fact that no receipts were given. It is a fact that Engelson testified in a contradictory manner. The trial court's

finding was clearly erroneous and the judgment should be reversed.

## 9. REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner reflect the fact that the evidence gathered by the Revenue Agent was the result of a warrantless "search." The only justification for such a search on the facts presented is the audit authority granted by statute to the Secretary of Treasury. At issue is the fundamental question of whether this extraordinary power is subject to the strictures of the Fourth and Fifth Amendments. It is submitted that a governmental agent who uses this power for a non-tax related purpose and misrepresents that purpose to the target taxpayer in order to gain consent to the examination violates both the letter and the spirit of the Constitutional prohibition against unreasonable searches

and seizures. The Petition should be granted.

10. RELIEF SOUGHT

WHEREFORE, the reasons set forth above, Petitioner Ernest L. Citron, prays that his Petition for Writ of Certiorari be favorable considered, and granted.

Respectfully Submitted,

Ronald T. Hubbard
Attorney for Petitioner
Member of the Bar
of the Supreme Court
of the United States
PLOTKIN, YOLLES, SIEGEL AND TURNER, P.C.
24700 Northwestern Highway
Suite 418
Southfield, Michigan 48075
(313) 354-3200

Dated: June 25, 1981

SUPREME COURT NO._____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

ERNEST L. CITRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Ronald T. Hubbard, being duly sworn, deposes and says that on the 25th day of June, 1981, he did in fact serve three copies of his Appearance and Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, with Appendix, by placing the same in an envelope, postage prepaid, and placing said envelope in a United States Post Office mail box, and addressed as follows:

The Solicitor General
Department of Justice
Washington, D.C. 20530

James K. Robinson, Esq.
United States Attorney
817 Federal Building
Detroit, Michigan 48226

M. Carr Ferguson, Esq.
Assistant Attorney General,
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

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Ronald T. Hubbard
Member of the bar of the
Supreme Court of the
United States

Subscribed and sworn to
before me this 25th day
of June, 1981.

---

Thomas H. Bergh, Notary Public
Wayne County, Michigan, acting
in Oakland County. My Commission
expires 6/28/82